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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-864

JOHN J. WILLIAMS, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JOHN J. WILLIAMS, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, John J. Williams, Sr., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which was entered on November 21, 1974.

OPINIONS BELOW.

The Federal District Court of Delaware, the Honorable Walter K. Stapleton, filed two unreported decisions concerning Motions to Dismiss the Indictments by defendants. They appear in the Appendix at pages A1 and A18. The Court of Appeals for the Third Circuit affirmed the judgment of the District Court of Delaware without a written opinion on November 21, 1974. The judgment Order is found in the Appendix at page A25.

JURISDICTION.

Petitioner was convicted of violating a Federal Statute, 18 U. S. C. § 1955 on March 1, 1974. The Court of Appeals for the Third Circuit affirmed this conviction, but stayed its mandate to the District Court of Delaware pending this Petition. On December 19, 1974 this Court granted Petitioner's motion for an extension of time to file this Petition for Writ of Certiorari until January 20, 1975. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

The petitioner was convicted of conspiracy to operate an illegal gambling operation involving five or more people and which was in substantially continuous operation for more than thirty days. The question presented is:

Can a defendant be convicted of conspiracy to violate a federal statute which requires concert of action to complete the substantive offense?

STATUTES INVOLVED.

The applicable statutes, 18 U. S. C. § 1955 and 18 U. S. C. § 371 are set forth in Appendix D, at page A27.

STATEMENT OF THE CASE.

After a long series of wiretaps by the Federal Bureau of Investigation, petitioner and fifteen other defendants were arrested and charged with both substantive and conspiratorial violations of 18 U. S. C. § 1955. The defendants were indicted by a Federal Grand Jury on May 12, 1972. At the request of the Government the substantive offense was dismissed, and the defendants were tried and convicted of conspiracy to violate 18 U. S. C. § 1955. The Conspiracy Statute, 18 U. S. C. § 371 when read in conjunction with 18 U. S. C. § 1955 requires that the defendants agree to carry on an illegal gambling business which involves five or more people and is in substantially continuous operation for a period of more than thirty days.

The defendants filed a Motion to Dismiss the conspiracy count of the indictment, and this Motion was joined with similar Motions pending before the District Court for the purposes of briefing and argument. The Motion was denied by Judge Stapleton on August 10, 1973. See Appendix A and B, pages A1, A18. The basis of the Motion was essentially that 18 U. S. C. § 1955 was unconstitutional, and that a prosecution for conspiracy to violate this Statute would not lie due to the application of Wharton's Rule. This Rule states that if a substantive offense requires concerted action among the defendants, the fact that the defendants conspired to commit this substantive offense poses no additional danger to the community which would warrant the imposition of a separate penalty for the conspiracy. Anderson, *1 Wharton's Criminal Law and Procedure*, § 89 (1957).

Judge Stapleton determined that Wharton's Rule was inapplicable to the case. All the defendants were subsequently convicted of conspiracy. Petitioner, John J. Williams, Sr., was sentenced to eighteen months imprisonment

and a fine of $5,000.00. Only the petitioner appealed the judgment of the District Court. The Court of Appeals for the Third Circuit affirmed the conviction on November 21, 1974, but stayed the issuance of a mandate until January 20, 1975. Petitioner is presently released on bail pending this Petition. The appeal from the District Court to the Third Circuit Court of Appeals was based on four grounds, one of which is the subject of this Petition: Wharton's Rule precludes a conspiracy conviction for violation of 18 U. S. C. § 1955. The other three issues raised in the Third Circuit Court of Appeals involved the sufficiency of the indictment and constitutionality of § 1955. These three issues are not made part of this Petition.

REASONS FOR GRANTING THE WRIT.

The decision below should be reviewed because of an erroneous decision on the application of Wharton's Rule to 18 U. S. C. § 1955. It is asserted that defendants cannot be convicted of conspiracy to violate § 1955, in that such a charge is precluded by the application of Wharton's Rule. This Petition should be granted because the Court of Appeals for the Third Circuit has rendered a decision in conflict with a decision in the Court of Appeals for the Seventh Circuit. Furthermore, the question presented on this appeal involves an important question of Federal Law which has not yet been settled by this Court. Presently, however, the Wharton's Rule issue is pending before this Court in the case of *Iannelli v. United States,* Certiorari granted, 94 S. C. 2602, 41 L. Ed. 2d 211 (1974). It should be noted that Judge Stapleton relied heavily on the *Iannelli* case in his opinions on this issue (Appendix A and B).

Petitioner is charged with the conspiracy to violate 18 U. S. C. § 1955 which requires that five or more people conduct, manage or finance an illegal gambling business which

was in substantially continuous operation for more than thirty days. Wharton's Rule states:

> An agreement by two or more persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two for its commission. Anderson, *1 Wharton's Criminal Law and Procedure,* § 89 (1957).

In other words, a conspiracy prosecution is prohibited where the substantive offense by its own nature involves more than two people to consummate. There is case law decided in the various Courts of Appeals which hold that Wharton's Rule does not apply to a prosecution under § 1955 where more than five people are indicted. *United States v. Iannelli,* 477 F. 2d 999 (3rd Cir. 1973), Cert. granted, 94 S. C. 2602, 41 L. Ed. 2d 211 (1974), *United States v. Becker,* 461 F. 2d 230 (2nd Cir. 1972). However, there are also cases in the Courts of Appeal which stand for the proposition that conspiracy to violate § 1955 merges with the completed offense, and the defendants could not be convicted for conspiracy and substantive offenses. *United States v. Hunter,* 478 F. 2d 1019 (7th Cir. 1973), *United States v. Manson,* 494 F. 2d 804 (7th Cir. 1974). The conspiracy charge in Count II of the Indictment in the case at bar is nothing more than the substantive crime committed by the conspirators. As was stated in the case of *United States v. Hunter, supra,* at page 1026, "but even though five or more persons are named in the indictment, a charge of conspiracy to violate § 1955 may not be maintained if it comprehends nothing more than the agreement which those persons necessarily performed by the commission of the substantive offense itself." The conflict between the Circuits in this matter is obvious.

The Supreme Court of the United States has recently recognized the need for an authoritative ruling on the application of Wharton's Rule to § 1955, and has granted Certiorari on this issue in the case of *Iannelli v. United States*, 94 S. C. 2602, 41 L. Ed. 2d 211 (1974). It is asserted by petitioner that the *Iannelli* case may very well dispose of the issue presented in this Petition. Until that time, however, petitioner asserts that this Court should grant this Petition for a Writ of Certiorari to the Third Circuit Court of Appeals in order that the issue presented herein is properly preserved and decided.

The issue presented in this case is of great and recurring significance as indicated by the number of appeals to the Court of Appeals from prosecution under § 1955. The serious conflict between the Third Circuit Court of Appeals and the Seventh Circuit Court of Appeals along with the pending cases before the Supreme Court of the United States make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted and that the time for the filing of briefs and appendices in this matter be stayed until this court decides the case of *Iannelli v. United States.*

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APPENDIX A.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE.

CRIMINAL ACTION NOS. 2256, 2257, 2258, 2259, 2260, 2273, 2320.

UNITED STATES OF AMERICA,
Plaintiff,

v.

MICHAEL J. PEPE, ET AL.,
Defendants.

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David Roeberg, Esquire, Wilmington, Delaware, Attorney for Defendants DiEmidio, Malone, J. Church, W. Church, and B. Conte

L. Vincent Ramunno, Esquire, Wilmington, Delaware, Attorney for Defendants J. Ortega, D. Ortega and DiGiacomo

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Richard L. McMahon, Esquire, Wilmington, Delaware, Attorney for Defendant Capodanno

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Memorandum Opinion.

Wilmington, Delaware

August 10, 1973

STAPLETON, *District Judge:*

In May of 1972 the grand jury returned several indictments charging defendants with conducting illegal gambling operations in violation of 18 U. S. C. § 1955 and with conspiracy to violate that statute, 18 U. S. C. § 371. Subsequently the government dismissed the count charging a violation of Section 1955. These cases have been consolidated for the purposes of pre-trial proceedings. The defendants have made various motions for the disclosure of the identity of informants, for dismissal of the indictments, for suppression of wiretap evidence, and for an evidentiary hearing.

1. Initially, the defendants argue that the indictments do not charge a crime because Section 1955 is unconstitu-

tional. The Third Circuit upheld the statute against similar attacks in *United States v. Riehl,* 460 F. 2d 454 (3rd Cir. 1972) and in *United States v. Ceraso,* 467 F. 2d 653 (3rd Cir. 1972). These cases control the instant ones.

2. Defendants next argue that the indictment should be dismissed because it is improper to charge a violation of the conspiracy statute when it is alleged that the aim of the conspiracy was a violation of a statute which, by its definition, requires concerted action. Defendants reliance on the so-called "Wharton's rule" is misplaced in these cases. The Third Circuit Court of Appeals has recently said in the case of *United States v. Iannelli,* — F. 2d — (Nos. 72-1696/72-1703 May 4, 1973):

> Appellants advance . . . [the] contention . . . that applying "Wharton's rule" they cannot be convicted both of a conspiracy in violation of 18 U. S. C. § 301 (sic: § 371) and of a substantive violation of 18 U. S. C. § 1955 because a section 1955 violation requires a minimum of five participants. More than five participants were however charged in the indictment. Thus the possible application of "Wharton's rule" is not presented. See U. S. v. Becker, 461 F. 2d 230 (2nd Cir. 1972), petition for cert. filed, 41 U. S. L. W. 3160 (U. S. July 28, 1972) (72-154); Developments in the Law of Criminal Conspiracy, 72 Harv. L. Rev. 920, 956 n. 252 (1959).

This holding clearly disposes of defendants' contention in all of these cases with the possible exception of Criminal Action No. 2256. In that action only four defendants are charged with violation of Section 371. However, the indictment charges a total of at least twenty different persons as participants in the conspiracy. Defendants rely upon the above-quoted language in support of their conten-

tion that unless there are more than five participants "charged in the indictment" Wharton's rule applies. This construction, however, is not persuasive in light of the Third Circuit's reliance upon the *Becker* case in which it was said:

> As long as the conspiratorial concert of action and the substantive offense underlying it are not coterminus and fewer participants are required for the commission of the substantive offense *than are named as joining in the conspiracy to commit it,* there is no infirmity in the conspiracy indictment.

United States v. Becker, 461 F. 2d 230, 234 (2nd Cir. 1972) (emphasis added). I conclude that the Third Circuit's language "charged in the indictment" should be read as consistent with the cited *Becker* opinion that looks to the number of persons engaged in the conspiracy, not to the number of persons charged with the crime.

3. Certain of the defendants argue that the indictments here are duplicious and should be dismissed. This argument is premised upon the proposition that proof of all of the allegations contained in the indictments would constitute proof of the commission of the substantive offense, i.e. a violation of Section 1955, and that the indictment, therefore, charges two criminal violations in a single count. The indictment is not duplicious, however. The allegation of facts which, if true, would constitute commission of the substantive offense does not detract from the conspiracy for acts constituting a conspiracy are "punishable as conspiracy though the intended crime be accomplished." *United States v. Rabinowich,* 238 U. S. 78 (1915). As the Supreme Court said in *Heike v. United States,* 227 U. S. 131 (1913):

> At all events liability for conspiracy is not taken away by its success—that is by accomplishment of the substantive events at which the conspiracy aims.

Several cases have held that the allegation of acts which would amount to commission of the substantive offense was merely descriptive of the conspiracy and did not render an indictment duplicious. *Reno v. United States,* 317 F. 2d 499 (5th Cir. 1963); *United States v. Illinois Alcohol Co.,* 45 F. 2d 145, 148 (2nd Cir. 1930); *Blum v. United States,* 46 F. 2d 850, 851 (6th Cir. 1931); *United States v. McKieghan,* 58 F. 2d 298 (E. D. Mich. 1932); *United States v. J. R. Watkins Co.,* 120 F. Supp. 154, 157 (D. Minn. 1954).

4. Various of the defendants move to strike the final paragraph of each indictment which alleges that those defendants spoke over the telephone in furtherance of the alleged conspiracy, on the ground that there is no indication of the content of any conversations. They argue that "accordingly, since a telephone conversation does not, by itself, constitute a crime, these paragraphs do not, on their face, charge overt acts in furtherance of a 'conspiracy'." It is, of course, hornbook law that the overt act in furtherance of the conspiracy which is necessary to sustain a conviction for criminal conspiracy, need not itself be a criminal act. *Braverman v. United States,* 317 U. S. 49, 53 (1942); *Yates v. United States,* 354 U. S. 298 (1957). As this Court has said:

> The significance of the overt act depends upon its context, not as it stands alone in the abstract. The government will, of course, bear the burden at trial of proving that an overt act was performed and that it was connected with the conspiracy as alleged.

United States v. Gibbons, Cr. A. No. 2174, Memorandum Opinion, September 12, 1972 at 12.

5. Defendant Capodanno, a defendant in Criminal Action No. 2257, has moved for disclosure of the identity of informers used by the government in gathering the evidence upon which these indictments are based. He insists that this information is relevant and necessary to the adequate preparation of his defense for two reasons. First, he cites *Roviaro v. United States,* 353 U. S. 53 (1957) for the proposition that the identity of an informer must be disclosed if the informant was an essential participant in the offense. He then posits that either of the informants may be an essential participant here. In this indictment the grand jury charged a conspiracy involving six named defendants and other persons unknown. Premised on the supposition that the existence of a gambling business involving at least five persons is an essential element of the crime charged, defendant argues that if, for example, the evidence at trial establishes that only three of the six named defendants were engaged in a "illegal gambling business" but that they were involved in the business with two other persons not named in the indictment, a conviction would not lie if it could be shown that the other two "co-conspirators" were in actuality government informants, acting as agents of the government. The question whether a government informant can be counted as one of the five persons engaged in a gambling business necessary to establish a violation of Section 1955, has specifically been left open by the Third Circuit Court of Appeals, *United States v. Riehl,* 460 F. 2d 454, 461 (3rd Cir. 1972), but a decision on the point in this case would be premature. Under *Roviaro,* the existence of a right to disclosure of the identity of an informant depends upon a balancing of the public interest in protecting the flow of information against the defendant's need for the information in mounting a defense. In the absence of extraordinary circumstances not here present,

this often delicate balance should not be struck at a time when the record is limited to the allegations of an indictment and speculation of counsel in briefing as to what may develop at trial. The government presumably will introduce factual evidence at trial from which it hopes the jury will infer that all or some of the defendants reached an agreement the object of which was to engage in a gambling business involving at least five people.* The defendants may cross-examine about who played what role. Questions may be asked which will not reveal the identity of the informer and yet may shed light on the defendant's need of the information he now seeks. Defendant may renew his motion at trial and, if necessary, ask for a reasonable continuance in the event the Court orders identification of the informants.

The second ground asserted as a basis for the disclosure of the identity of the informers is that they may have induced defendant to the commission of the crime. There is no reason presently to suppose that this is the case. Here also I conclude that the defendant's motion

* The defendant would appear to be in error in suggesting that the existence of a gambling business involving more than five people is an essential element of the crime here charged. The government need not establish the underlying substantive offense in order to convict a defendant of a violation of 18 U. S. C. § 371. Conceivably, two persons who agreed to pursue the goal of establishing and running an illegal gambling business as defined in Section 1955, that is who, among other things, agreed to recruit at least three other participants, and who took some overt action in furtherance of that purpose could be convicted of a violation of Section 371. The *Riehl* case does not indicate the contrary. There the conspiracy charged was a violation of 18 U. S. C. § 1511 which makes it unlawful to conspire to obstruct the enforcement of criminal laws with the intent to facilitate an illegal business if, among other things, one or more of the persons conspiring "conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business" there defined in Section 1955. There an element of the conspiracy was the establishment of the existence in fact of the illegal gambling business, this is not an essential element of a conspiracy under Section 371.

should be denied at the present time. If at the trial it develops that there is some evidence that a defendant was induced to enter into the alleged conspiracy, the defendant is, of course, free to renew his motion at that time.

Similarly, the motion for disclosure of identity of informers in Criminal Action No. 2256 will be denied.

6. In Criminal Action No. 2273 the defendant DiEmidio asks the Court to suppress wiretap evidence on the ground that he was not served with an inventory of his intercepted communications within the ninety day period contemplated by 18 U. S. C. § 2518(8)(b). The statute creates a discretionary power vested in the judge who approved the wiretap application to cause an inventory of relevant intercepted conversations to be served on the persons named in the application and such other parties as he deems appropriate. DiEmidio was not a person named in the application. He has no statutory right to an inventory and in the context of these facts his failure to receive one is no basis for suppression of the evidence. Moreover, he has since been apprised of the information which an inventory would have made available to him and is in substantially the same position that he would have been in had he received the inventory within ninety days of determination of the tap. See *United States v. Iannelli, supra* at 5.

7. The remaining questions present a wide ranging attack upon the various wiretaps that were used in gathering the evidence upon which these indictments are based. First, several of the defendants assert that the government failed to make "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appeared to be unlikely to succeed if tried or to be too dangerous" in its application for the wiretap as by statute it must. 18 U. S. C. § 2518

(1)(c). Inspection of the applications with their appended affidavits from special agents of the F. B. I. establish that other investigative procedures if tried would be unlikely to succeed. That is all the statute requires. See *United States v. Seifert*, Cr. A. No. 2370, Memorandum Opinion March 28, 1973.

8. Several of the defendants moved for suppression on the ground that the orders permitting the wiretaps failed to meet the statutory mandate of 18 U. S. C. §2518(4)(c) which requires specificity as to "a particular description of the type of communication to be intercepted, and a statement of the particular offense which it relates." It is true that the order, unlike the wiretap application itself, does not cite the Delaware Code sections which were alleged to be violated. However, the order does specifically relate the offenses to which the communication sought to be intercepted related, that is, 18 U. S. C. §§371, 1955. It does not follow that because a Section 1955 violation is dependent upon a violation of state law that the particularity requirement of 18 U. S. C. §2518(4)(d) itself requires more than a statement of the particular federal offense which is being investigated. The orders describe the communications to be seized in terms of which the following are typical:

> . . . these wire communications will concern the acceptance of wagers and the dissemination of information on the numbers game and sporting events to persons involved in the unlawful business of gambling and the participants in said offense; . . .*

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* Other limitations were also imposed. In Misc. 71, for example, the order included the following provision:

> PROVIDING ALSO THAT oral communications in and from the areas surrounding the left-hand side and right-rear corners of the above described premises shall not be intercepted when it has been determined by electronic surveillance that persons on the premises described above are engaging in social or legitimate

As stated in the orders, such activity is in violation of Delaware law. The purpose of this portion of the statute is to establish and inform the executive officers of the extent of the authority granted. In this context, the description of activity illegal under state law, together with the citations to the relevant federal statutes was entirely adequate. Read as a whole, it is clear that the orders in question properly narrowly defined the communications relevant to the charge being investigated that could be seized.

9. All of the defendants assert that an evidentiary hearing is required in these cases because, they maintain, the papers which were presented to the District Court upon the application for wiretap authority raised some question as to whether proper procedures were followed by the government in making that application. Specifically, they would like an opportunity to develop evidence on the question whether the Attorney General in fact authorized these applications.

The government has tendered to the Court xerox copies of letters and internal government memoranda which indicate on their face that the applications to this Court in Misc. Nos. 71 and 72 were personally approved by John N. Mitchell while he was serving as Attorney General and that the application to this Court in Misc. Nos. 75, 76 and 77 were personally approved by Richard G. Kleindienst

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* (Cont'd.)
business conversations which are not the subject of the investigation described in the application of Assistant United States Attorney Richard D. Levin and the affidavits attached thereto or which are not evidence of other crimes not specified in the aforementioned application and affidavits, provided further that no such oral communications shall be intercepted unless it is determined by physical or electronic surveillance that at least one of the persons named in paragraph a(i) above is present on the above described premises and a participant in the conversation.

while he was serving as Acting Attorney General following Mr. Mitchell's resignation.*

With respect to the applications in Misc. Nos. 71 and 72, these documents include memoranda purportedly initialed by the Attorney General containing a text comparable to that construed in *United States v. Ceraso*, 467 F. 2d 647 (3rd Cir. 1972) as indicating his approval of the application and his delegation to an Assistant Attorney General of the authority to perform the ministerial act of signing a letter authorizing the application. The government's documents also include xerox copies of the ensuing letters purportedly signed by the designated Assistant Attorney General. These documents, if accepted as genuine, would demonstrate the legality of the applications under the rules established in the *Ceraso* case.

With respect to the applications in Misc. Nos. 74, 75 and 76, the government's documents include memoranda purportedly initialed or signed by Mr. Kleindienst. In one instance the same form utilized by Mr. Mitchell was used. In the other two the memoranda specifically state "I hereby authorize the above-described application. . . ."

The controlling rule on defendants' application for an evidentiary hearing was stated by the Third Circuit in *In re Horn*, 458 F. 2d 468 (3rd Cir. 1972) as follows:

> [When an aggrieved party] . . . files a petition to suppress pursuant to 18 U. S. C. § 2518(10)(a), the Government is obligated to "affirm or deny the occurrence of the unlawful act." 18 U. S. C. § 3504(a)(1). It may do so by affidavit. In the Matter of Grumbles, 453 F. 2d 119 (3d Cir. 1971). If the affidavit is sufficient on its face and the petitioner offers nothing to indicate that the affidavit is false or defective, the

* Defendants do not contest the Acting Attorney General's authority to exercise the powers of the Attorney General.

> trial court has the power to deny the petition. Grumbles, supra, at 122. Although our decision in Grumbles certainly does not foreclose an evidentiary hearing where appropriate, we held in that case that since the petitioners had not presented "any evidence demonstrating that these representations by the Government [were] false," id. at 122, a hearing was not warranted. . . .

While *In re Horn* involved a denial under oath by the government of any prior interception of any conversation of the aggrieved party or of communications from her premises, the same statutes are applicable and the same procedural rules have been consistently applied in cases involving challenges to the procedure leading up to a court application for wiretap authority.

As previously noted, the government's documents, if accepted as authentic, demonstrate the propriety of the procedure followed in these cases. The defendants, on the other hand, have offered nothing which would indicate that the procedure indicated in the document was not in fact what occurred.* The crucial questions, accordingly, become whether there is any satisfactory authentication in this record of the government's documents and, if not, whether the unauthenticated copies constitute sufficient showing to permit the government to successfully invoke the *Horn* rule.

The government has introduced the affidavit of Mr. Sol Lindenbaum which states in pertinent part as follows:

> I have continuously served in the position of Executive Assistant to the Attorney General of the United States since April 11, 1967.

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* Defendants' argument that the procedure described in the affidavits supporting the wiretap application conflict with the above described documents was discussed and rejected in the *Ceraso* case.

> On January 21, 1972, and February 18, 1972, Attorney General John N. Mitchell approved requests for authorization to make application for interception orders with respect to certain wire and oral communications in Wilmington, Delaware. Attached are copies of the Attorney General's personally initialed memoranda of those dates to Henry E. Peterson reflecting his approvals of the requests.

The defendants correctly point out that Mr. Lindenbaum does not specifically state that he personally observed the execution of the memoranda relevant to Misc. Nos. 71 and 72. He does, however, state facts making it clear that he is familiar with the handwriting of John Mitchell and affirms that the attached papers are initialed by him. Proposed Federal Rule of Evidence 901(b)(2) codifies the "conventional doctrine" that a document may be authenticated by "nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of litigation." Proposed Rule of Evidence 1003 provides that "a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in view of the original." I think it appropriate to apply here the doctrines reflected in these rules and hold, based on the *Horn* case, that no evidentiary hearing is required with respect to the applications approved in Misc. Nos. 71 and 72.

The government's documents relating to Misc. Nos. 74, 75 and 76 are not authenticated by an affidavit, however, and the *Horn* case is, accordingly, not in point. I conclude that the government's showing here is inadequate.

This is not a case where the government attorney presenting documents to the Court has personal knowledge of

their authenticity and it does not impose an onerous burden to require an affidavit of someone having personal knowledge of facts indicating that the government's position is well taken.

There is no reason to believe, however, that the tendered documents cannot be properly authenticated and an evidentiary hearing at this time should not be required. The defendants' motions for an evidentiary hearing will be denied on the condition that the government file an appropriate authenticating affidavit within twenty days of the date of this opinion. If such an affidavit is not filed within that period, the Court will set a date for an evidentiary hearing on the propriety of the procedure leading up to the applications granted in Misc. Nos. 74, 75 and 76.

10. The final issue presented by these motions is whether an evidentiary hearing is required to establish whether certain wiretaps referred to in the government's first application for wiretap authority were lawful and, if they were not, whether fruits of such illegal searches provided in part at least, the basis for the Court's finding of probable cause for issuance of the orders granting such authority here.

Pursuant to its view of what was required of it by Section 2518(1)(e) * the government disclosed in its application for wiretap authority that certain earlier taps had been made on telephones belonging to individuals not

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* 18 U. S. C. § 2518 provides in pertinent part:

(1) Each application shall include the following information:

* * *

(e) A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each subsequent application;

defendants here. The government further disclosed that in the course of those interceptions, conversations of persons with whom some of the defendants associated were overheard. The names of such persons were disclosed; none of them are defendants here. The association with those persons by various of the defendants was an element upon which the government in part relied to establish probable cause and, presumably was the reason for the disclosure in the application to this Court.

One of the taps disclosed was found to be illegal by this Court in *United States v. Gibbons, supra* (Misc. No. 66). Another has been challenged in a pending case in this Court which has been stayed pending appeal by the government in *Gibbons* (Misc. No. 59). The government has submitted affidavits of those in charge of the investigation leading up to these cases stating that no evidence contained in this application for wiretap authority in these cases derived from any prior electronic surveillance.

The Court need not confront the issue the defendants tender since it does not now appear that any of the defendants have standing to challenge the validity of any of the prior wiretaps. The rule is now well established that:

> Suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Co-conspirators and co-defendants have been accorded no special standing.

Alderman v. United States, 394 U. S. 165, 171 (1969). In order to have standing to object to a putative unlawful search and seizure one's own conversations must have been overheard, *Jones v. United States,* 362 U. S. 257, 261 (1960) or the taps must have been on a telephone on one's private premises. *Alderman, supra* at 178.

Nor does Chapter 119 of Title 18 provide a basis which permits third parties to object to the legality of a search and seizure. Section 2518(10)(a) permits "any aggrieved person" to move for the suppression of the contents of any intercepted wiretap or oral communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted, the order of authorization or approval under which it was intercepted is insufficient on its face, or the interception was not made in conformity with the order of authorization or approval. The pertinent legislative history indicates that this section did not contemplate broadening the concept of standing to object developed in the Fourth Amendment cases.* The Supreme Court took note of this legislative history when in *Alderman* it said:

> Of course Congress or state legislatures may extend the exclusionary rule and provide that illegally seized evidence is inadmissible against anyone for any purpose. . . . Congress has not done so. In its recent wiretapping and eavesdropping legislation, Congress has provided only that an "aggrieved person" may move to suppress the contents of a wire or oral communication intercepted in violation of the act. . . . 18 U. S. C. § 2518(10)(a) (1964 ed. supp. IV). The legislative history indicates that "aggrieved person" the limiting phrase currently found in Fed. Rule Crim. Proc. 41(e) should be construed in accordance with existing standing rules. See S. Rep. No. 1097, 90th Cong. 2d Sess. at 91, 106.

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* "Paragraph (11) defines 'aggrieved person' to mean any person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed. This definition defines the class of those who are entitled to invoke the suppression sanction of Section 2515. . . . It is intended to reflect existing law (Jones v. United States, 362 U. S. 257 (1960) . . .)." 1968 U. S. Code Cong. & Adm. News 2112, 2179-80.

Alderman v. United States, supra at 175 n. 9.*

These defendants have not claimed, nor does the record contain any suggestion, that any of their conversations were intercepted during the prior taps nor that those prior taps were of telephones on their premises. In short, defendants claim that the prior taps may have been illegal and that fruits of those taps may have been utilized in securing the authorization granted in Misc. Nos. 71, 72, 74, 75 and 76, but do not claim to be "parties aggrieved" by the prior taps. Accordingly, no evidentiary hearing is required.*

Submit order.

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* Similar views are reflected in the recent case of *Gelbard v. United States,* 408 U. S. 41, 46 (1972). See also *In re Marx,* 451 F. 2d 466 (1st Cir. 1971); *In re Womack,* — F. 2d — (7th Cir. 1972).

* If indeed any defendant here did claim to be a "party aggrieved", 18 U. S. C. § 1304, resolution of the issues raised is, at least as an initial matter, not by an evidentiary hearing but rather by way of a government affidavit. See *In re Horn,* 458 F. 2d 468 (3rd Cir. 1972).

APPENDIX B.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE.

Criminal Action No. 2260.

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN J. WILLIAMS, SR., HELEN SCARANO, DOROTHY "DOT" "RUSTY" BUFFINGTON, MARIE "MICKEY" MALONE, CLARA CONTE, BARBARA CONTE, ANTHONY "DUCKY" DE TORE, EDWARD CARUCCI, ANTHONY P. "DOGS" DI GIACOMO, FRANCES RETKOWSKI, WANDA LEWALSKI, DOMINICK A. "WIGGLES" DI MATTEO, JAMES O. CHURCH, WANDA CHURCH, AND LEON MILLER,

Defendants.

Bruce L. Thall, Esquire, Assistant United States Attorney, Wilmington, Delaware, Attorney for Plaintiff

Stuart B. Young, Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware, Attorney for Defendant DiGiacomo

Stephen B. Potter, Esquire, of Potter and Roeberg, Wilmington Delaware, Attorney for Defendants C. Conte, Retkowski, Scarano, Williams, De Tore, Miller, Di Matteo, Lewalski, and Buffington

David Roeberg, Esquire, of Potter and Roeberg, Wilmington, Delaware, Attorney for Defendants Malone, J. Church, W. Church, and B. Conte

Henry N. Herndon, Jr., Esquire, of Morris, James, Hitchens & Williams, Wilmington, Delaware, Attorney for Defendant Carucci

Memorandum Opinion.

Wilmington, Delaware
February 11, 1974

STAPLETON, *District Judge:*

The indictment in this case charges that the fifteen defendants conspired to violate Section 1955 of Title 18 of the United States Code. The defendants moved to dismiss this count of the indictment arguing that "Wharton's rule" made conspiracy to violate Section 1955 an unindictable offense. The government responded that Wharton's rule was inapplicable because Section 1955 could be violated with the cooperation of only five persons and the indictment in this case alleged a conspiracy by more than five people. The Court sustained this argument on the authority of *United States v. Iannelli*, 477 F. 2d 999 (3rd Cir. 1973).

At the pre-trial conference, the government urged that Wharton's rule was inapplicable for other reasons and asked the Court to charge that a defendant might be convicted of conspiring to violate Section 1955 without a finding by the jury that he conspired with five or more other defendants. Both sides have suggested that it would be helpful to have some pretrial indication of the Court's view on this matter. While final disposition of any request for instructions must await the presentation of all the evidence, the Court feels that the request for an indication of its current views on this subject is a reasonable one.

Wharton's rule, as articulated by its originator, was that "an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of [the same] two persons for its commission." * The Supreme Court stated the rule as follows in *Pinkerton v. United States*, 328 U. S. 640 (1946):

> A conspiracy charge may not be added to a substantive criminal charge where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. . . .

The rule has been most frequently applied in the context of crimes such as bribery, adultery and concealing a fugitive from justice.

Under the general law of conspiracy, a substantive crime and a conspiracy to commit that crime are considered separate offenses, each punishable in its own right. The underlying rationale is that the agreement to commit the offense represents an additional social hazard and provides an additional element of the offense of conspiracy which justifies the additional sanction.* The theory of the Wharton rule exception, as I understand it, is that where an agreement or conspiracy is a necessary element of the substantive crime, there is no additional social hazard and no additional element of conduct or state of mind when the two people whose cooperation is necessary to the commission of the substantive offense agree between themselves to commit it. The rule is limited by this rationale. Thus, for example, A and B cannot be prosecuted for conspiring

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* 1 Wharton, *Criminal Law*, § 89, p. 191 (1957).

* *United States v. Rabinowitz*, 238 U. S. 78 (1915); Note, *Developments in the Law, Criminal Conspiracy*, 72 Harv. L. Rev. 919, 923-925, 953-956 (1955).

to the end that A and B commit adultery. At the same time, as the Wharton treatise points out, A, B and C can each be convicted of conspiring to the end that A and B commit adultery.**

Section 1955 makes it a substantive offense against the United States for anyone to participate in the running of an illegal gambling business of a particular size. It is necessary for the government to show that an illegal gambling business existed which was in substantially continuous operation for more than thirty days (or which grossed more than $2,000 in a single day) and in which five or more persons participated. It is *not necessary* for the government to show that the defendant knew that five or more persons were involved. It is sufficient if a gambling business of the requisite character existed and the defendant willfully participated.*

It can be argued that the substantive crime proscribed by Section 1955, as a matter of logic and common sense, necessarily involves an agreement. One cannot participate in the running of a gambling business without some kind of understanding with someone else who was involved in the running of that business. It would be a mistake, however, in my judgment to jump from this observation to the conclusion that Section 1955 presents an appropriate context for application of the Wharton rule.

The only agreement logically necessary for a violation of Section 1955 is not the same agreement necessary to prove a conspiracy to violate that section. A, who runs or wishes to run, an illegal numbers operation, may reach an agreement with B that B will write numbers, that B will be compensated from the proceeds, and that A will take all the profits and cover all losses. A may independently agree

** 1 Wharton, *Criminal Law*, § 89, p. 193 (1957).

* *United States v. Iannelli*, 477 F. 2d 999 (3rd Cir. 1973).

with C and D, respectively, to do the same, and with E to write the sheet. If the enterprise in fact operates for a period in excess of thirty days each will have violated Section 1955. Each agreement, however, was an agreement between two people for each of them to perform a particular function of a numbers operation.

The conspiracy indictment in this case, however, alleges a different kind of agreement. It alleges that the fifteen defendants agreed among themselves to run a particular kind of gambling business, that is, a gambling business which would involve five or more people and would remain in substantially continuous operation for a period in excess of thirty days. It is, of course, not necessary under this indictment for the government to prove that all fifteen so agreed in order to convict one who did so agree with others of the group. Accordingly, in the absence of an instruction to the contrary, the jury could convict a particular defendant if they found that he conspired with only one of the other defendants to run a business of the character described in the indictment.* Even in this event, however, the agreement between the two convicted defendants will not have been the agreement logically necessary for a violation of Section 1955. It will have been an agreement to run a particular kind of illegal gambling business which Congress has determined poses a particular threat to interstate commerce.*

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* If the jury convicts three of the defendants, it will be apparent that they have found an agreement among more people than the number of people whose agreement is logically necessary to the substantive crime defined in Section 1955. *Cf. United States v. Iannelli*, 477 F. 2d 999 (3rd Cir. 1973).

* While I do not find the point necessary to decide here in light of the allegations of the indictment, I doubt that there can be a conviction for conspiracy to violate Section 1955 absent some common understanding on the part of the conspirators that the contemplated gambling business would involve five or more participants. This is not inconsistent with *Iannelli's* holding regarding the essential elements of a Section 1955 offense. If a gambling business in fact

In summary, in order to convict for a violation of Section 1955, the government must show an illegal gambling business in operation for more than thirty days and involving five or more people who participated in its running. No agreement to operate a business of these proportions need be shown. A given participant may be convicted even though he may have known of the existence of only one other participant and had no idea that anyone else was involved. In order to convict for a conspiracy to violate Section 1955, however, the government must prove that a particular defendant reached an agreement with one or more others to work together for the establishment or maintenance of an illegal gambling business which would involve five or more participants and would be in operation for more than thirty days.

This agreement is an additional element to the conspiracy charge. Moreover, two people working together with this kind of objective facilitate the perpetration and concealment of the substantive crime.* Accordingly, the social hazard is significantly greater than in the situation hypothesized above where one person undertakes to operate an illegal gambling business of the requisite proportions through a series of independent arrangements with others who have no knowledge of the existence of others and have no commitment to the furtherance of the overall enterprise.

For these reasons, I conclude that this case is an appropriate one for application of the general conspiracy

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* (Cont'd.)
exists this social evil against which Congress sought to guard is present and anyone participating may be punished whether or not he knew of four other participants. Where conspiracy is concerned, however, and there is no necessity for showing completion of its objective, it is difficult to believe that Congress intended criminal sanctions absent a showing that the agreement was such as to lead to the creation of a business of the requisite size.

* *Cf. United States v. Rabinowitz*, 238 U. S. 78, 88 (1915).

rule, rather than the Wharton rule exception. I think this conclusion is supported by the rationale of the Wharton rule, by *United States v. Iannelli,* 477 F. 2d 999 (3rd Cir. 1973); by *United States v. Bobo,* 477 F. 2d 974 (4th Cir. 1973); *United States v. Kohne,* 347 F. Supp. 1178 (W. D. Pa. 1972), and the logic of the analysis in the Harvard Law Review student note cited above.

I presently intend to charge, in the context of all of the essential elements of the conspiracy, that any given defendant can be convicted of a conspiracy to violate Section 1955 if he reached a common understanding with one or more of the others named in the indictment as co-conspirators to work towards the establishment or maintenance of an illegal gambling business which they anticipated would have five or more participants and which they expected to be in existence for a period in excess of thirty days.

In accordance with this conclusion I will charge that there is no need that each member of the conspiracy know every other member or all dealings of the conspiracy. It is necessary, however, that each member know the overall objective of the conspiracy and reach an agreement with one or more others of the conspiracy to attempt to further that objective. In this case, the objective alleged was to conduct an illegal gambling business which would involve five or more persons and be in existence for more than thirty days. Each member of the conspiracy, therefore, must have had an understanding or expectation that five or more people would be involved.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1553

UNITED STATES OF AMERICA

v.

JOHN J. WILLIAMS, SR., HELEN SCARANAO, DOROTHY "DOT" "RUSTY" BUFFINGTON, MARIE "MICKEY" MALONE, CLARA CONTE, BARBARA CONTE, ANTHONY "DUCKY" DE TORE, EDWARD CARUCCI, ANTHONY P. "DOGS" DI GIACOMO FRANCES RETKOWSKI, WANDA LEWALSKI, DOMINICK A. "WIGGLES" DI MATTEO, JAMES O. CHURCH, WANDA CHURCH, JOSEPH PAUL MAZZIO, LEON MILLER

JOHN WILLIAMS, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
Crim. No. 2260

Submitted Under Third Circuit Rule 12(6)

November 19, 1974

Before: ADAMS, GIBBONS and WEIS, *Circuit Judges*

BRUCE L. THALL
First Assistant
United States Attorney
Attorney for Appellee

STEPHEN B. POTTER, ESQUIRE
Wilmington, Delaware
Attorney for Appellant

Judgment Order.

After considering the contentions set forth by appellant, namely, that 18 U. S. C. 1955 is unconstitutional, that under Wharton's Rule a prosecution under 18 U. S. C. § 371 for conspiracy to violate 18 U. S. C. § 1955 will not lie inasmuch as such conduct does not constitute a crime, that the indictment should be dismissed for failing to properly state the required overt acts, and that the trial court erred in denying defendant's motion to dismiss the indictment for failure to contain a plain, concise and definite statement of the essential facts constituting the offense charged, it is

ADJUDGED AND ORDERED that the judgment of the district court be and the same is hereby affirmed.

By THE COURT,

ARLIN M. ADAMS,
Circuit Judge.

ATTEST:

THOMAS F. QUINN,
Clerk.

DATED: November 21, 1974

APPENDIX D.

18 U. S. C. § 1955.

§ 1955 PROHIBITION OF ILLEGAL GAMBLING BUSINESSES

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) Illegal gambling business means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

18 U. S. C. § 371.

§ 371 CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD THE UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not

more than $10,000 or imprisoned not more than five years or both.

If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.